No. 15-274

IN THE

Supreme Court of the United States

WHOLE WOMAN'S HEALTH, ET AL.,
Petitioners,

v.

KIRK COLE, M.D., COMMISSIONER OF THE TEXAS DEPARTMENT OF STATE HEALTH SERVICES, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF PROFESSORS MICHAEL DORF, HELEN HERSHKOFF, GILLIAN METZGER, NEIL SIEGEL, AND DAVID STRAUSS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

E. Joshua Rosenkranz
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Eric Shumsky
ORRICK, HERRINGTON & SUTCLIFFE LLP
Columbia Center
1152 15th Street, NW
Washington, DC 20005

Robert Yablon
Counsel of Record
UNIVERSITY OF WISCONSIN LAW SCHOOL
975 Bascom Mall
Madison, WI 53706
(608) 262-2240
robert.yablon@wisc.edu

Gillian E. Metzger
CENTER FOR CONSTITUTIONAL GOVERNANCE
COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

Counsel for Amici

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

INTEREST OF *AMICI* 1

INTRODUCTION AND SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. THE FIFTH CIRCUIT'S CLAIM PRECLUSION RULING IS CONTRARY TO THE PRECEDENTS OF THIS COURT AND OTHER CIRCUITS. 3

A. Preclusion Doctrine Is Inapplicable Because This Case Presents Claims Distinct From Those In The Prior H.B. 2 Litigation 5

B. The Fifth Circuit's "One Statute, One Lawsuit" Rule And Its Equation Of Ripeness With Preclusion Are Deeply Flawed. 10

1. The Fifth Circuit's "One Statute, One Lawsuit" Rule Is Unsound And Conflicts With The Sixth Circuit's Approach. 11

2. The Fifth Circuit Misapprehended Ripeness Doctrine And Its Relationship To Preclusion. 13

C. The Fifth Circuit's Special Preclusion Rule For "Facial" Challenges Is Misguided And Threatens To Deepen Confusion In The Lower Courts. 15

II. CERTIORARI IS ALSO WARRANTED BECAUSE THE FIFTH CIRCUIT'S DECISION FLOUTS PRINCIPLES OF CONSTITUTIONAL AVOIDANCE..... 18

CONCLUSION 23

TABLE OF AUTHORITIES

Cases

Alma Motor Co. v. Timken-Detroit Axle Co.,
329 U.S. 129 (1946).....20

Andersen v. Chrysler Corp.,
99 F.3d 846 (7th Cir. 1996).....12

Arizona v. California,
530 U.S. 392 (2000).....21

Ashcroft v. al-Kidd,
131 S. Ct. 2074 (2011).....21, 23

Ashwander v. Tenn. Valley Auth.,
297 U.S. 288 (1936).....19

Bank of New York v. First Millennium, Inc.,
607 F.3d 905 (2d Cir. 2010).....7

Bond v. United States,
134 S. Ct. 2077 (2014).....19

Camreta v. Greene,
131 S. Ct. 2020 (2011).....21, 22

Citizens United v. Fed. Election Comm'n,
558 U.S. 320 (2010).....16

City of Los Angeles v. Patel,
135 S. Ct. 2443 (2015).....16

Clay v. Sun Ins. Office Ltd.,
363 U.S. 207 (1960).....19

Clinton v. Jones,
520 U.S. 681 (1997).....20

Drake v. Federal Aviation Admin.,
291 F.3d 59 (D.C. Cir. 2002).....7

Ellis v. CCA of Tennessee LLC,
650 F.3d 640 (7th Cir. 2011).....6

EPA v. Brown,
431 U.S. 99 (1977).....13

Escambia Cty. v. McMillan,
466 U.S. 48 (1984).....19

Gonzales v. Carhart,
550 U.S. 124 (2007).....17

Hamilton's Bogarts, Inc. v. Michigan,
501 F.3d 644 (6th Cir. 2007).....11

Hurd v. Hodge,
334 U.S. 24 (1948).....20

Lawlor v. Nat'l Screen Serv. Corp.,
349 U.S. 322 (1955).....6, 8

Lloyd A. Fry Roofing Co. v. City of Minneapolis,
551 F.2d 200 (8th Cir. 1977).....8

Lujan v. Nat'l Wildlife Fed'n,
497 U.S. 871 (1990).....13

Lyng v. Northwest Indian Cemetery Protective Ass'n,
485 U.S. 439 (1988).....19

Mata v. Lynch,
135 S. Ct. 2150 (2015).....23

McDonough v. City of Quincy,
452 F.3d 8 (1st Cir. 2006).....12

Morgan v. Covington Twp.,
648 F.3d 172 (3d Cir. 2011).....6

In re Murray Energy Corp.,
788 F.3d 330 (D.C. Cir. 2015).....13

N.Y. City Transit Auth. v. Beazer,
440 U.S. 568 (1979).....20

New Hampshire v. Maine,
532 U.S. 742 (2001).....5

Ohio v. Akron Center for Reproductive Health,
497 U.S. 502 (1990).....17

PDK Labs. Inc. v. U.S. Drug Enf't Admin.,
362 F.3d 786 (D.C. Cir. 2004).....20

Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott,
951 F. Supp. 2d 891 (W.D. Tex. 2013).....7

Planned Parenthood of Greater Tex. Surgical Health Services v. Abbott,
748 F.3d 583 (5th Cir. 2014).....4, 6, 7

Planned Parenthood Southwest Ohio Region v. DeWine,
696 F.3d 490 (6th Cir. 2012).....12

Planned Parenthood v. Casey,
505 U.S. 833 (1992).....17

Scott v. Harris,
550 U.S. 372 (2007).....21

Spector Motor Serv. v. McLaughlin,
323 U.S. 101 (1944).....19

Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.,
467 U.S. 138 (1984).....20

U.S. Citizens Ass'n v. Sebelius,
705 F.3d 588 (6th Cir. 2013).....12

United States v. Grace,
461 U.S. 171 (1983).....16

United States v. Sioux Nation,
448 U.S. 371 (1980).....21

Statutes

H.B. 2, 83d Legis., 2d Spec. Sess. (Tex. 2013).....2, 14

Other Authorities

Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235 (1994) 15, 17

Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321 (2000) 15, 17

Richard H. Fallon, Jr., *Fact and Fiction about Facial Challenges*, 99 Calif. L. Rev. 915 (2011) 15, 16

Richard H. Fallon, Jr., et al. *Hart & Wechsler's The Federal Courts and the Federal System* (7th ed. 2015) 6

Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes In Toto*, 98 Va. L. Rev. 301 (2012) 18

Gillian E. Metzger, *Facial Challenges and Federalism*, 105 Colum. L. Rev. 873 (2005) 16

Restatement (Second) of Judgments (Am. Law Inst. 1982) 5, 8

Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* (3d ed. 2008) 13

Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* (2d ed. 2002) 5, 10, 11, 21

INTEREST OF *AMICI*[1]

Amici are Professors Michael Dorf (Cornell Law School), Helen Hershkoff (New York University School of Law), Gillian Metzger (Columbia Law School), David Strauss (University of Chicago Law School), and Neil Siegel (Duke University Law School). *Amici* are leading scholars and teachers of federal courts and civil procedure. They study and write extensively on the procedural aspects of federal court adjudication, including the doctrine of res judicata, the concepts of facial and as-applied challenges, and the principle of constitutional avoidance. *Amici* have an interest in promoting the clear, consistent, and fair application of procedural rules and in avoiding distortions of those rules that threaten to erode judicial integrity.

INTRODUCTION AND SUMMARY OF ARGUMENT

Procedural wrinkles often get cast as vehicle problems—reasons for this Court to turn away petitions that pose questions otherwise suitable for review. Sometimes, however, the presence of an antecedent or alternative procedural ruling offers a vehicular bonus, bolstering the argument for this Court's intervention. This is such a case.

---

[1] The parties have consented to the filing of this *amicus* brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than *amici* and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

In the decision below, the Fifth Circuit held that claim preclusion prevented petitioners from obtaining facial relief on their constitutional claims. That holding is unequivocally wrong. Petitioners challenged two provisions of a Texas statute, H.B. 2: the provision requiring that physicians performing abortions have admitting privileges at a nearby hospital (the admitting privileges provision) and the provision requiring that abortion clinics be subject to regulatory standards equivalent to those for ambulatory surgical centers (the ASC provision).[2] In a previous suit, petitioners pursued a different set of legal challenges to H.B. 2. Specifically, petitioners brought pre-enforcement facial challenges to the admitting privileges requirement and to H.B. 2's restrictions on medication abortion. Because petitioners' current claims rest on distinct facts and circumstances that arose largely after the earlier litigation, the basic requirement for claim preclusion—that the prior and current claims are part of the same factual transaction—is not met.

There is thus no danger that the Fifth Circuit's claim preclusion ruling will interfere with this Court's ability to reach and resolve the substantive constitutional questions raised by the petition. In the certiorari calculus, the opportunity to address the preclusion issue is a plus, not a minus. It will allow the Court to disavow the Fifth Circuit's flawed approach to preclusion doctrine. The Fifth Circuit's preclusion determination rests on three misguided assumptions: that all challenges to a statute must be brought in one omnibus litigation; that failure to

---

[2] *See* H.B. 2, 83d Legis., 2d Spec. Sess. (Tex. 2013).

bring a ripe claim necessarily results in preclusion; and that failure of a pre-enforcement facial challenge precludes any subsequent grant of facial relief. All three assumptions are fundamentally at odds with the content and purposes of preclusion doctrine and governing precedent. They would sow confusion among lower courts and create troubling incentives for litigants. Lower courts regularly grapple with preclusion questions but rarely receive direction from this Court, making clarification of the Fifth Circuit's mistakes here particularly valuable.

Additionally, by granting the petition the Court will be able to remind lower courts that the doctrine of constitutional avoidance strongly disfavors what the Fifth Circuit did here—namely, hold that a constitutional claim is procedurally barred and then reach out to decide it anyway. Such a two-step approach is especially problematic to the extent that it creates procedural disincentives for review of constitutional rulings by this Court.

ARGUMENT

I. THE FIFTH CIRCUIT'S CLAIM PRECLUSION RULING IS CONTRARY TO THE PRECEDENTS OF THIS COURT AND OTHER CIRCUITS.

The doctrine of claim preclusion does not bar petitioners from pursuing their current challenges to Texas House Bill 2. The reason is simple: For preclusion purposes, the constitutional claims that petitioners advance in this litigation and the claims they previously advanced in *Planned Parenthood of*

Greater Texas Surgical Health Services v. Abbott, 748 F.3d 583 (5th Cir. 2014), are not part of a single, unitary transaction. *See infra* Section I.A.

The Fifth Circuit committed three serious errors in concluding that *Abbott* bars petitioners' current claims seeking facial relief. Each of these errors confirms that the court's preclusion determination creates no barrier to this Court's review of the merits of petitioners' constitutional challenges. And because some of these errors evince broader conflict and confusion in the law, this Court should seize the opportunity to correct them and reinforce basic principles of preclusion doctrine.

First, the Fifth Circuit erroneously adopted a novel "one statute, one lawsuit" rule to the effect that if a plaintiff challenges one aspect of a multifaceted statute, any later challenge to any other aspect of the statute counts as part of the same initial transaction and is thus barred. *See infra* Section I.B.1. Second, the Fifth Circuit bungled ripeness doctrine, incorrectly holding that the ASC challenge was ripe at the time of *Abbott* and further that this challenge therefore was now precluded. *See infra* Section I.B.2. Third, the Fifth Circuit mistakenly suggested that if a law survives an initial facial challenge, a litigant is forever barred from obtaining facial relief in the future, even if intervening events otherwise warrant such a remedy. *See infra* Section I.C. These three moves are at odds with governing doctrine and the purposes of preclusion, create perverse incentives for litigants, and risk sowing confusion on issues with which the lower courts already struggle, such as the distinction between facial and as-applied challenges.

A. Preclusion Doctrine Is Inapplicable Because This Case Presents Claims Distinct From Those In The Prior H.B. 2 Litigation.

The doctrine of claim preclusion does not require plaintiffs to bring all of their constitutional objections against a defendant in one all-encompassing action. Instead, it prohibits "successive litigation of the very same claim." *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001).[3] Two suits present the same "claim" for preclusion purposes when they involve a single "transaction" or "series of connected transactions." Restatement (Second) of Judgments § 24(1) (Am. Law Inst. 1982). This so-called "transactional test" calls for courts to consider whether the facts at issue in the prior action and the current one "are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage." Restatement (Second) of Judgments § 24(2); *see also* 18 Wright & Miller § 4407, at 158-60. Thus, claim preclusion only applies to bar a challenge if the plaintiff "could and should have raised" the challenge in prior litigation involving the same transaction. Richard H. Fallon. Jr., *et al.*,

---

[3] *See also* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4406, at 140-41 (2d ed. 2002) ("[A] judgment does not preclude everything that might have been disputed between the parties, but only matters within a certain sphere. If the second lawsuit involves a new claim or cause of action, the parties may raise assertions or defenses that were omitted from the first lawsuit even though they were equally relevant to the first cause of action.") [hereinafter "18 Wright & Miller"].

Hart & Wechsler's The Federal Courts and the Federal System 1365 (7th ed. 2015).[4]

The transactional test is not met here because the operative facts in this case are distinct from those in *Abbott*. This suit hinges in substantial part on events that postdate the filing of *Abbott* in September 2013 and the district court's entry of judgment a month later. These new developments comprise a new claim for preclusion purposes. As this Court has put it, the judgment in an initial suit "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328 (1955). Building on this common sense proposition, courts have generally embraced a "bright-line rule that *res judicata* does not apply to events post-dating the filing of the initial complaint." *Morgan v. Covington Twp.*, 648 F.3d 172, 177-78 (3d Cir. 2011) (identifying five other circuits that have expressly adopted such a rule).[5]

---

[4] Preclusion's terminology sometimes causes confusion. In normal litigation usage, a "claim" typically refers to a particular cause of action or legal challenge. In preclusion doctrine, however, a "claim" is synonymous with a factual "transaction," and a single transaction may give rise to multiple causes of action.

[5] *See also Ellis v. CCA of Tennessee LLC*, 650 F.3d 640, 652 (7th Cir. 2011) ("The federal rule is that claim preclusion generally does not bar a subsequent lawsuit for issues that arise after the operative complaint is filed."); *Bank of New York v. First Millennium, Inc.*, 607 F.3d 905, 919 (2d Cir. 2010) ("Claim preclusion does not bar claims, even between identical parties, that arise after the commencement of the prior action."); *Drake v. Federal Aviation Admin.*, 291 F.3d 59, 66 (D.C. Cir. 2002)

The plaintiffs in *Abbott* challenged the admitting privileges and medication abortion provisions of H.B. 2 before they took effect and sought to prevent them from becoming enforceable. The two sides in *Abbott* vigorously disputed the expected effects of these provisions based on the evidence of impact that was available at that time. Indeed, the defendants maintained that it was "impossible to prove the impact of HB 2's hospital-admitting privileges requirement unless the law is allowed to take effect." State Defendants' Trial Brief at 26-27, *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 951 F. Supp. 2d 891 (W.D. Tex. 2013). The Fifth Circuit ultimately discounted plaintiffs' predictions and rejected their pre-enforcement challenge. *Abbott*, 748 F.3d at 597-98. In so holding, the court expressly stated that its "opinion[] [was] confined to the record before the trial court," and it declined to "consider any arguments" based on "developments since the conclusion of the bench trial." *Id.* at 599 n.14. Following the *Abbott* litigation, the admitting privileges requirement became operative, which changed the facts on the ground. As the Fifth Circuit acknowledged in the decision below, some of plaintiffs' original predictions came true.[6]

("*Res judicata* does not preclude claims based on facts not yet in existence at the time of the original action.").

[6] *See* Pet. App. 60a ("We now know with certainty that non-ASC abortion facilities have actually closed and physicians have been unable to obtain admitting privileges after diligent effort. Thus, the actual impact of the combined effect of the admitting privileges and ASC requirements on abortion facilities, abortion

In their current suit, petitioners contend that these new developments render the admitting privileges requirement unconstitutional. Preclusion doctrine leaves them free to try to make that case. Petitioners "could not possibly" have brought their challenge to the actual effects of the admitting privileges requirements in a pre-enforcement challenge. *Lawlor*, 349 U.S. at 328. The underlying facts simply did not yet exist. Where, as in *Abbott*, a judgment presupposes a particular state of affairs, it does not enjoy "infinite prospective effect." *Lloyd A. Fry Roofing Co. v. City of Minneapolis*, 551 F.2d 200, 201-02 (8th Cir. 1977) (per curiam).

Allowing suits based on new circumstances to go forward is particularly important when constitutional interests are implicated. The commentary to the Restatement (Second) of Judgments, which this Court and others frequently cite on preclusion matters, puts it this way: "Where important human values—such as the lawfulness of a continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought." Restatement (Second) of Judgments § 24, cmt. f.

It is, if anything, even clearer that petitioners' challenge to the ASC provision is not precluded. When *Abbott* was litigated, the ASC requirements had yet to take effect. More than that, the Department of State Health Services had not even adopted the im-

---

physicians, and women in Texas can be more concretely understood and measured.").

plementing regulations that would define clinics' specific obligations. And H.B. 2 did not require the Department to act until months after the effective date of the admitting privileges and medication abortion provisions that were at issue in *Abbott*. Had petitioners tried to challenge the ASC provision at the time that *Abbott* was litigated, their claim very likely would have been rejected on ripeness grounds. *See infra* Section I.B.2. Moreover, they would have had to assert that *any conceivable* regulation the Department might adopt would violate their constitutional rights. Such a challenge is distinct from petitioners' current challenge to the *actual* ASC regulations that were later issued. If the Department had adopted other regulations—for example, ones that provided for grandfathering of existing abortion facilities or allowed clinics to apply for waivers—petitioners would have been in a different position and might not have challenged the ASC requirement at all. This suit is petitioners' first chance to litigate the constitutionality of regulations that did not previously exist.

Petitioners should not now be faulted for adopting an eminently sensible—and appropriately self-restrained—litigation strategy: They first brought suit (in *Abbott*) to challenge the portions of H.B. 2 that they believed most clearly and immediately threatened their interests, but they waited to see the content of the regulations adopted to implement H.B. 2's discrete ASC provision before deciding whether further litigation was necessary.[7] By penalizing petitioners for choosing this course, the Fifth Circuit's ruling

---

[7] *Cf.* 18 Wright & Miller § 4408, at 201 (explaining that parties may seek expeditious resolution of urgent matters in an

creates perverse incentives for parties to expand the scope of litigation prematurely by pursuing objections that are not yet ripe and may never become so.

Furthermore, beyond the issue of timing, the subject matter of petitioners' ASC challenge is distinct from the admitting privileges and medication abortion challenges presented in *Abbott*. The ASC regulations impose a completely different set of obligations than those other provisions and even come with their own separate enforcement mechanism. As a result, determining whether the ASC regulations impose an undue burden has little factual overlap with the inquiries into the constitutionality of the admitting privileges and medication abortion provisions. The state itself seemed to recognize this when it proposed bifurcating the trial in this case and dealing with the ASC and admitting privileges requirements separately. *See* ROA 2785-86.

B. The Fifth Circuit's "One Statute, One Lawsuit" Rule And Its Equation Of Ripeness With Preclusion Are Deeply Flawed.

Two of the Fifth Circuit's three key preclusion-related errors pertain to the court's determination that petitioners' ASC challenge was part of the same transaction as the challenges in *Abbott* and thus precluded. First, the Fifth Circuit relied on the fact that all of the contested provisions were enacted in a single statute. Second, it held that the ASC challenge was

---

initial action "while leaving the way open for more deliberate presentation" of other matters later).

ripe for review when *Abbott* was filed and therefore should have been included in that litigation. *See* Pet. App. 37a-42a. Both of these conclusions are at odds with the approach taken by other courts and create serious practical difficulties.

1. The Fifth Circuit's "One Statute, One Lawsuit" Rule Is Unsound And Conflicts With The Sixth Circuit's Approach.

A legislature's decision to consolidate discrete provisions in one bill has little bearing on the transactional test for preclusion. Omnibus legislation does not require omnibus litigation. Were the rule otherwise, parties would be forced to pursue a mishmash of unrelated issues in a single lawsuit or else risk having potentially objectionable provisions forever shielded from review. To avoid incentivizing such unwieldy litigation, courts routinely treat challenges to different regulations as "separate claims" even when the regulations are part of one overarching "[g]overnment regulatory scheme[]." 18 Wright & Miller § 4408, at 52 (2d ed. Supp. 2015); *see, e.g.*, *Hamilton's Bogarts, Inc. v. Michigan*, 501 F.3d 644, 650 (6th Cir. 2007). They define transactions by looking to shared operative facts, not to the happenstance of a shared legislative history. And here, the facts relevant to the ASC challenge are very different from those relevant to the admitting privileges and medication abortion challenges in *Abbott*. *See supra*, at 8-10.[8]

---

[8] *Cf. McDonough v. City of Quincy*, 452 F.3d 8, 17 (1st Cir. 2006) (advising "that a claim preclusion analysis should not

The Fifth Circuit's transactional analysis is squarely at odds with the Sixth Circuit's recent decision in *Planned Parenthood Southwest Ohio Region v. DeWine*, 696 F.3d 490 (6th Cir. 2012), which involved constitutional challenges to Ohio's medication abortion law. In *DeWine*, the Sixth Circuit held that an undue burden challenge still pending before the District Court was distinct from the plaintiffs' other challenges, notwithstanding that all were "facial challenges to the same statute" and thus "all contain[ed] at least one common operative fact—the passage of the challenged law." *Id.* at 501.[9] Notably, one of the *DeWine* plaintiffs' other challenges was also an undue burden challenge. If two somewhat different undue burden challenges to the same medication abortion restriction qualify as distinct claims, then challenges to two entirely separate restrictions surely do as well. This Court should resolve the conflict the Fifth Circuit created and reject its "one statute, one lawsuit" rule.

---

proceed at too high a level of generality because of the risk of unfairly precluding a litigant from having her day in court." (quoting *Andersen v. Chrysler Corp.*, 99 F.3d 846, 853 (7th Cir. 1996))).

[9] The issue in *DeWine* was whether the pending challenge barred appellate jurisdiction over the challenges on which the District Court had granted summary judgment. Under Fed. R. Civ. P. 54(b), appellate jurisdiction exists in such a circumstance only if the unresolved claim is truly distinct from the other claims—"a similar inquiry" to claim preclusion's transactional test. *Id.* at 501 n.13. The Sixth Circuit later reached a similar conclusion in a challenge to the Affordable Care Act. *U.S. Citizens Ass'n v. Sebelius*, 705 F.3d 588, 594-95 (6th Cir. 2013).

2. The Fifth Circuit Misapprehended Ripeness Doctrine And Its Relationship To Preclusion.

The Fifth Circuit's conclusion that petitioners' ASC challenge was ripe in *Abbott* and therefore now precluded is doubly wrong. First, contrary to the Fifth Circuit's conclusion, the ASC challenge was almost certainly unripe when petitioners brought suit in *Abbott*. After all, the usual rule is that "courts should not undertake review before rules have been adopted." 13B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3532.6, at 629 (3d ed. 2008); *see also id.* ("The factors that weigh against review of incomplete agency proceedings are even more pronounced if a federal court is asked to interfere with a state agency."). Indeed, this Court has refused "to review regulations not yet promulgated, the final form of which has only been hinted at," describing such review as "wholly novel." *EPA v. Brown*, 431 U.S. 99, 104 (1977).[10]

The Fifth Circuit suggested that a departure from the standard rule against pre-regulation review was appropriate here because the content of the regulations was a foregone conclusion. *See* Pet. App. 38a.

---

[10] *Cf. Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990) (explaining that courts generally "intervene in the administration of the laws only when, and to the extent, that a specific 'final agency action' has an actual or immediately threatened effect"); *In re Murray Energy Corp.*, 788 F.3d 330, 334 (D.C. Cir. 2015) ("We may review final agency rules. But we do not have authority to review proposed rules." (citations omitted)).

But the Department of State Health Services undoubtedly had discretion in deciding how to implement the statute's broad requirement that abortion facilities meet "minimum standards" for health and safety "equivalent to the minimum standards . . . for ambulatory surgical centers." H.B. 2, § 4.[11] If the legislature had meant for the ASC provision to be fully self-implementing, it would not have provided for rulemaking at all—much less given the Department many months to develop its rules.

Second, even if petitioners might have managed to convince a court that an ASC challenge was ripe at the time of *Abbott*, that does not mean the challenge had to be included in that litigation or be lost forever. The fact that a claim is not ripe during an initial litigation is a sufficient reason to deny preclusion later. But the reverse is not true. Preclusion is not required simply because an arguably ripe claim was not brought at the earliest possible opportunity. Preclusion doctrine does not force parties to pursue marginally ripe claims when those claims may ultimately develop in ways that make their ripeness clear or that refine the contours of the controversy.

---

[11] For instance, as Petitioners note, the Department might have provided for the grandfathering of existing facilities or allowed them to obtain waivers (since such accommodations are made for non-abortion facilities), but it ultimately declined to do so. *See* Pet. 30 & n.12. Moreover, nothing in the statute precluded the Department from revising its general ambulatory surgical center rules as part of the rulemaking process, which would have altered the baseline for assessing "equivalen[ce]."

C. The Fifth Circuit's Special Preclusion Rule For "Facial" Challenges Is Misguided And Threatens To Deepen Confusion In The Lower Courts.

The Fifth Circuit's third error infects both its ASC and admitting privileges analysis. The court mistakenly held that, to the extent factual developments since *Abbott* justified further litigation, petitioners could only pursue "as-applied" challenges to the disputed provisions and not "facial" ones. *See* Pet. App. 37a. This conclusion is erroneous and reflects confusion about the nature of "facial" and "as applied" claims. Because courts frequently struggle with these concepts, clarification from this Court would be extremely valuable.

The underlying problem for the Fifth Circuit and other courts is that, even though references to "facial" and "as-applied" challenges are ubiquitous, "the meaning of both terms is elusive." Richard H. Fallon, Jr., *Fact and Fiction about Facial Challenges*, 99 Calif. L. Rev. 915, 922 (2011) [hereinafter "Fallon, *Fact and Fiction*"]; *see also* Michael C. Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235, 294 (1994). In fact, "facial challenges are less categorically distinct from as-applied challenges than is often thought." Richard H. Fallon, Jr., *As-Applied and Facial Challenges and Third-Party Standing*, 113 Harv. L. Rev. 1321, 1341 (2000) [hereinafter "Fallon, *As-Applied*"].

Facial challenges are commonly identified as challenges that seek wholesale or "facial" invalidation of legislation, with as-applied challenges by contrast

seeking only to prevent the legislation's application in certain contexts. *See* Fallon, *Fact and Fiction*, *supra*, at 923. But this characterization mistakenly conflates the analytic content of a facial challenge with its remedial effect. Analytically, a facial challenge is one that targets a general rule of law, whereas an as-applied challenge targets particular applications of that rule.[12] *See City of Los Angeles v. Patel*, 135 S. Ct. 2443, 2449 (2015) ("A facial challenge is an attack on a statute itself as opposed to a particular application."); Gillian E. Metzger, *Facial Challenges and Federalism*, 105 Colum. L. Rev. 873, 880-81 (2005). To be sure, facial invalidation is a frequent effect of a successful facial challenge, but it is not a necessary effect; a court may instead respond by carving the legislative provision in question down to constitutional proportions. *See, e.g., United States v. Grace*, 461 U.S. 171, 183-84 (1983). Moreover, as this Court has made clear, facial invalidation may be a proper remedy in an as-applied challenge, if the arguments and evidence produced demonstrate that the rule as a whole is unconstitutional. *Citizens United v. Fed. Election Comm'n*, 558 U.S. 320, 331 (2010).[13]

---

[12] This general rule focus explains the frequent identification of a facial challenge as targeting a statutory provision "on its face," without regard to application.

[13] See also *Patel*, 135 S. Ct. at 2458 (Scalia, J., dissenting) ("[T]he effect of a given case is a function not of the plaintiff's characterization of his challenge, but the narrowness or breadth of the ground that the Court relies upon in disposing of it."); Fallon, *As-Applied*, *supra*, at 1339 ("[O]nce a case is brought, no general categorical line bars a court from making broader pronouncements of invalidity in properly 'as-applied' cases").

In this case, petitioners contend that evidence developed since *Abbott* demonstrates that the challenged provisions of H.B. 2 serve no valid state interest and have the purpose and effect of creating a substantial obstacle to the ability of Texas women to choose a previability abortion. If petitioners are right about that, then those provisions are unconstitutional under the undue burden test set out in *Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992), and petitioners could qualify for facial relief. *See Casey*, 505 U.S. at 895 (holding spousal permission provision to be facially invalid because it had the effect of creating a substantial obstacle in a large fraction of cases where it was relevant); *see also* Dorf, *supra*, at 279 ("If a statute serves an impermissible purpose, courts cannot save it . . . . The invalid legislative purpose pervades all of the provision's applications.").[14] The fact that constitutional challenges to abortion restrictions require evidentiary development and are sensitive to changing circumstances does not preclude a facial remedy once a constitutional violation is shown.[15]

---

[14] This Court suggested in *Gonzales v. Carhart*, 550 U.S. 124 (2007), that it remains an open question whether litigants who satisfy *Casey*'s "large fraction" standard are indeed entitled to facial relief or whether they must meet the presumably heavier burden of showing "that no set of circumstances exists under which [a law] would be valid." *Id.* at 167 (quoting *Ohio v. Akron Center for Reproductive Health*, 497 U.S. 502, 514 (1990)).

[15] *See, e.g.*, Scott A. Keller & Misha Tseytlin, *Applying Constitutional Decision Rules Versus Invalidating Statutes* In Toto, 98 Va. L. Rev. 301, 360 (2012) ("The undue-burden [test] directs courts to look at how the statute would function in the real world in particular cases[.]").

The Fifth Circuit therefore erred when it held that the District Court below had illegitimately "resurrected the facial challenge put to rest in *Abbott*" in granting facial invalidation. Pet App. 35a. Regardless of whether petitioners brought a facial or as-applied challenge, facial invalidation could be a proper remedy here. Equally important, claim preclusion does not limit plaintiffs to a single facial challenge, even against the same provision, if the subsequent claim they seek to bring is not part of the same transaction as the earlier litigation. Given that this case involves different operative facts than *Abbott* and thus different claims under the transactional test, petitioners were entitled to bring these claims in either a facial or as-applied form.

II. CERTIORARI IS ALSO WARRANTED BECAUSE THE FIFTH CIRCUIT'S DECISION FLOUTS PRINCIPLES OF CONSTITUTIONAL AVOIDANCE.

As troubling as the Fifth Circuit's flawed holding on preclusion is the fact that the court reached out to resolve petitioners' supposedly barred facial claims, establishing constitutional precedent that will govern throughout the circuit. The court's action flies in the face of the venerable doctrine of constitutional avoidance. If the panel believed that petitioners' constitutional claims were not properly presented, then it should have left those claims unresolved. Even worse, such a two-step move can insulate a constitutional ruling from this Court's scrutiny by raising procedural barriers to further review. The Court should make clear that it does not condone such an approach. This case offers an excellent opportunity to stress that

constitutional questions should be answered only when procedurally appropriate.

The Court has long been emphatic about the importance of forbearance in constitutional cases: "If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv. v. McLaughlin*, 323 U.S. 101, 105 (1944). Thus, "if a case can be decided on either of two grounds," one constitutional and one not, "the Court will decide only the latter." *Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).[16] The Court has described this as "a fundamental rule of judicial restraint." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984); *see also PDK Labs. Inc. v. U.S. Drug Enf't Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004)

---

[16] *See also, e.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014) ("[I]t is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case.'") (quoting *Escambia Cty. v. McMillan*, 466 U.S. 48, 51 (1984) (per curiam)); *Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 445 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them."); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 209 (1960) ("By the settled canons of constitutional adjudication the constitutional issue should have been reached only if, after decision of the two non-constitutional questions, decision was compelled."); *Hurd v. Hodge*, 334 U.S. 24, 30 n.6 (1948) ("It is well-established that this Court will not decide constitutional questions where other grounds are available and dispositive of the issues of the case.").

(Roberts, J., concurring in part and concurring in the judgment) (noting "the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more"). And the Court has stressed that the rule "is applicable to the entire Federal Judiciary, not just to this Court." *Clinton v. Jones*, 520 U.S. 681, 690 (1997).[17]

In recent cases, this Court has made clear that any exceptions to the rule of avoidance are narrow. It has discouraged courts from reaching out to decide constitutional issues even when—unlike here—such rulings are arguably necessary to facilitate the law's development. Thus, while courts in qualified immunity cases retain discretion to decide whether officials acted unconstitutionally even when that determination is not strictly necessary, this Court has advised that its "usual adjudicatory rules suggest that a court *should* forbear resolving [the underlying constitutional] issue." *Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011) (emphasis in original). "In general," the Court has counseled, "courts should think hard, and then think hard again, before turning small cases into large ones." *Camreta*, 131 S. Ct. at 2032.[18]

---

[17] *See also N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 582 (1979) (condemning as a "departure from settled federal practice" an appellate court's decision to resolve a constitutional claim when a statutory one had also been raised); *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, 137 (1946) ("This same rule should guide the lower courts as well as this one.").

[18] *See also id.* at 2044 (Kennedy, J. dissenting) ("Haste to resolve constitutional issues has never been thought advisable. We instead have encouraged the Courts of Appeals to follow 'that older, wiser judicial counsel not to pass on questions of

Forbearance is especially appropriate when it comes to resolving constitutional claims supposedly barred by claim preclusion. After all, one of the doctrine's main functions is to relieve parties and courts of the burden of litigating matters that were or should have been raised previously. *See, e.g.*, *Arizona v. California*, 530 U.S. 392, 412 (2000) (quoting *United States v. Sioux Nation*, 448 U.S. 371, 432 (1980) (Rehnquist, J., dissenting)); 18 Wright & Miller § 4403, at 20 ("the immediate purpose and effect" of claim preclusion is "to preclude any litigation of matters that should have been litigated previously").

The panel offered no valid justification for ruling on petitioners' constitutional claims despite identifying another ground for disposing of them. In contrast to the qualified immunity context, there is no danger here that the law will be left "permanently in limbo." *Camreta*, 131 S. Ct. at 2031. Myriad potential plaintiffs in the Fifth Circuit could choose to challenge H.B. 2's constitutionality. But stare decisis now stands in the way and may well discourage them from even trying, at least to the extent they seek facial relief. The panel at one point suggested that it was addressing the merits of petitioners' constitutional claims "for the purpose of completeness" in case its claim preclusion ruling "is incorrect." Pet. App. 42a. The panel was

---

constitutionality unless such adjudication is unavoidable.'") (quoting *Scott v. Harris*, 550 U.S. 372, 388 (2007) (Breyer, J., concurring)); *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011) ("Courts should think carefully before expending 'scarce judicial resources' to resolve difficult and novel questions of constitutional or statutory interpretation that will 'have no effect on the outcome of the case.'").

right to doubt the correctness of its preclusion analysis, *see supra* Part I. But that is no excuse, let alone justification. The doctrine of constitutional avoidance would be eviscerated if it allowed courts to make constitutional rulings simply to hedge against the possibility that their non-constitutional rulings might be wrong.

It is vital for this Court to ensure that lower courts apply constitutional avoidance at least as vigorously as this Court does itself. Otherwise this Court will be called upon to review constitutional rulings that never needed to be made. The Court, however, has less incentive to intervene when a ruling is not outcome determinative, which means that the least necessary constitutional rulings are the ones most likely to escape this Court's scrutiny. By averting such needless rulings, this Court helps to ensure that lower courts do "not insulate constitutional decisions at the frontiers of the law from [its] review." *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2080 (2011).[19]

Here, the panel's procedural ruling is so clearly incorrect that this Court still has ample reason to review the panel's constitutional holding. But that will not be true in every case. And that is precisely why this case provides an ideal opportunity for this Court to discourage other courts from similarly pairing procedural and constitutional rulings. The Court should

---

[19] *Cf. Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) ("What the Fifth Circuit may not do is to wrap such a merits decision in jurisdictional garb so that we cannot address a possible division between that court and every other.")

emphasize that, if the panel thought there was a real preclusion problem, it should have gone no further.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

E. Joshua Rosenkranz
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Eric Shumsky
ORRICK, HERRINGTON & SUTCLIFFE LLP
Columbia Center
1152 15th Street, NW
Washington, DC 20005

Robert Yablon
Counsel of Record
UNIVERSITY OF WISCONSIN LAW SCHOOL
975 Bascom Mall
Madison, WI 53706
(608) 262-2240
robert.yablon@wisc.edu

Gillian E. Metzger
CENTER FOR CONSTITUTIONAL GOVERNANCE
COLUMBIA LAW SCHOOL
435 West 116th Street
New York, NY 10027

October 5, 2015